166 FERC ¶ 61,174
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick,

Duke Energy Carolinas, LLC	Docket Nos. ER19-155-000 ER19-155-001
Duke Energy Progress, LLC	ER19-156-000 ER19-156-001

ORDER ACCEPTING AS-AVAILABLE CAPACITY SALES AGREEMENT

(Issued March 8, 2019)

1. On October 22, 2018, Duke Energy Carolinas, LLC (Duke Energy Carolinas) and Duke Energy Progress, LLC (Progress) (together, Parties) filed, pursuant to section 205 of the Federal Power Act (FPA),[1] an As-Available Capacity Sales Agreement (Agreement). The Agreement permits the Parties to sell each other short-term capacity when one Party has more capacity than it needs and the other Party has determined that it would benefit from the acquisition of such capacity. For the reasons discussed below, we accept the Agreement, effective December 22, 2018, as requested.[2]

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[1] 16 U.S.C. § 824d (2012).

[2] The Parties did not include the associated filing identifier at the record level in its amended filing, which resulted in two versions of the tariff record remaining open. Thus, the tariff records filed in Docket Nos. ER19-155-000 and ER19-156-000 are rejected as moot. See *FERC Staff's Responses to Discussion Questions,* Tariff Record Related Codes, Questions at 28, for the need to provide a complete set of associated tariff record information; and *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings*, at 12-13 (Nov. 14, 2016), for the definitions of the associated record data elements.

I. The Agreement

2. The Parties are each indirect, wholly-owned subsidiaries of Duke Energy Corporation (Duke), and serve both retail and wholesale customers in their respective service areas in North Carolina and South Carolina. In March 2012, in connection with their merger,[3] Duke and Progress executed a Joint Dispatch Agreement, which provides for the joint dispatch of Duke Energy Carolinas' and Carolina Power & Light Company's respective generation fleets to serve their loads.[4] The Joint Dispatch Agreement serves to achieve the efficiencies and benefits of the Duke-Progress Merger, as savings from the joint dispatch—in fuel, purchased power, and related savings—will go directly to retail and wholesale customers in North Carolina and South Carolina.[5] However, the Joint Dispatch Agreement provides for the joint dispatch of energy between the Parties, but not capacity.

3. The Agreement permits the Parties to sell each other short-term capacity when one Party has more capacity than it needs and the other Party has determined that it would benefit from the acquisition of such capacity. The Parties assert that they can obtain additional savings for native load customers if they establish a framework under which one Party can make temporarily excess capacity available to the other Party. The Parties state that, without the Agreement, the Parties must procure additional short-term capacity at higher, market-based prices—and often bundled with unneeded energy—or commit a generation resource that might have otherwise been offline.[6] The Parties explain that the Agreement does not provide for a single integrated system, a single Balancing Authority Area (BAA),[7] joint generation or transmission planning, the

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[3] *Duke Energy Corp.*, 136 FERC ¶ 61,245 (2011), *order rejecting compliance filing*, 137 FERC ¶ 61,210 (2011), *order accepting revised compliance filing*, 139 FERC ¶ 61,194 (2012), *order denying reh'g*, 149 FERC ¶ 61,078 (2014).

[4] Duke is the parent company of Duke Energy Carolinas and Progress is the parent company of Carolina Power & Light Company.

[5] *Duke Energy Corp.*, 166 FERC ¶ 61,112, at P 3 (2019).

[6] Transmittal Letter at 2. The Parties note that the Commission rejected two prior versions of the Agreement for reasons that the Parties have resolved in this version. *Id.* at 2-3 (citing *Duke Energy Carolinas, LLC*, 148 FERC ¶ 61,149 (2014); *Duke Energy Carolinas, LLC*, 161 FERC ¶ 61,029 (2017)).

[7] Pursuant to the Agreement, "Balancing Authority Area" is defined as "the collection of generation, transmission, and loads within the metered boundaries of the

construction of any generation or transmission facilities, or any rate equalization.[8] In addition, the Parties state that the Agreement does not provide for energy sales and is not intended to modify or alter the Joint Dispatch Agreement.[9]

4. Pursuant to the Agreement, the Parties propose to exchange capacity if three conditions are met: (1) the providing Party determines that it will have temporarily excess capacity (i.e., more capacity than is required to meet applicable reliability standards); (2) the recipient Party has determined that it would benefit from acquiring that capacity; and (3) the recipient Party has determined, to the best of its knowledge after making reasonable market inquiries under the circumstances, that there are not more economical alternatives available to the recipient Party to obtain capacity for the period in question.[10] With regard to the third condition, the Parties explain that their short-term capacity needs are determined in part based on the results of a short-term planning model. If either Party requires additional capacity, it will evaluate the most efficient and cost-effective course of action, which could include relying on its own generation or pursuing a market solution (i.e., a third party purchase). The Parties state that, because there generally are a limited number of potential sellers in the Southeast region, the Agreement provides another potential seller of needed capacity to each Party. The Agreement requires the recipient Party to retain for five years documentation associated with that Party's reasonable market inquiries.[11]

5. The Parties state that the duration of any single transaction under the Agreement will be for no less than four consecutive hours and no more than seven consecutive days.[12] According to the Parties, this reflects that the Agreement is not intended to be used for long-term capacity planning purposes. The Parties also explain that the minimum four hour duration is consistent with capacity products typically offered in the

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Balancing Authority within which the Balancing Authority maintains the load-resource balance." Agreement § 1.

[8] Transmittal Letter at 4; Agreement § 3.2.

[9] Transmittal Letter at 6; Agreement § 4.5.

[10] Transmittal Letter at 4; Agreement § 4.1.

[11] Transmittal Letter at 4-5; Agreement § 4.1.

[12] Transmittal Letter at 5; Agreement § 4.2.

Southeast region, and the maximum seven day duration represents the Parties' short-term planning horizon for available supply and demand forecasting.[13]

6. The Agreement does not provide for transmission service; rather, the recipient Party is responsible for obtaining firm transmission service into its BAA pursuant to the Duke Energy Carolinas, Progress, and Duke Energy Florida, LLC Open Access Transmission Tariff (Joint OATT). The Parties state that the Agreement also requires them to abide by the commitments they made concerning limitations on rights to reserve firm transmission pursuant to the Duke-Progress Merger.[14]

7. The price for capacity sold under the Agreement is a weighted average of the clearing prices in a given delivery year in the Rest-of-RTO locational deliverability area[15] of the PJM Interconnection, L.L.C. (PJM) capacity market for (1) Capacity Performance Resources, (2) Base Capacity Resources, and (3) Annual Resources, weighted by the percentage of each resource type procured by PJM.[16] The Agreement states the prices for the years in which PJM has already conducted the relevant capacity market auction.[17] According to the Parties, this is a transparent and objective capacity market pricing methodology that has been reviewed and accepted by the Commission. Since the Parties do not operate in a region with an organized market, they contend that the PJM capacity market clearing price is a third-party price determined through an auction that neither Party may control or influence, but is a reasonable proxy for capacity prices in the Parties' service territories because PJM is adjacent and the Parties regularly make sales into and purchases out of PJM.[18] The Parties argue that the Commission has approved similar pricing arrangements and, consistent with that precedent, the Parties are

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[13] Transmittal Letter at 5 n.15.

[14] *Id.* at 5; Agreement § 4.3.

[15] PJM defines locational deliverability area as "a geographic area within the PJM region that has limited transmission capability to import capacity to satisfy such area's reliability requirement." *See* PJM Open Access Transmission Tariff, Definitions, L-M-N, 8.1.0.

[16] Transmittal Letter at 5-6; Agreement § 4.4(b). The terms "Capacity Performance Resource," "Base Capacity Resource," and "Annual Resource" have the meaning given to them in PJM's Open Access Transmission Tariff, Attachment DD. Transmittal Letter at 6 n.18; Agreement § 4.4(a).

[17] Transmittal Letter at 6; Agreement § 4.4(c).

[18] Transmittal Letter at 6-7.

submitting the Agreement as a stand-alone rate schedule that does not provide for market-based sales.[19] The Parties note that the information regarding sales under the Agreement that will be reported in the Parties' Electric Quarterly Reports (EQRs) will be comparable to, and indeed more robust than, that required by the Commission in the past. In addition, the Parties state that their wholesale customers are provided additional rate protection through the audit rights contained in their wholesale formula rate power purchase agreements with the Parties.[20]

8. The Parties' requested effective date is December 22, 2018, and the initial term of the Agreement will run through May 31, 2022. The Agreement will automatically extend annually for one-year periods after May 31, 2022, provided that the price of capacity under the Agreement is equal to or less than the fixed Benchmark Price of $123.56 per megawatt-day.[21] The Agreement will automatically terminate after the initial term, or any subsequent extensions, if the price of capacity under the Agreement is greater than that Benchmark Price. Irrespective of these term provisions, either Party may terminate the Agreement for any reason upon six months' prior written notice.[22]

9. On December 7, 2018, Commission staff notified the Parties that their October 22, 2018 filing was deficient and that the Commission would need further information to process the filing. On January 7, 2019, the Parties submitted a response to the deficiency letter (Deficiency Letter Response).

II. Notice and Responsive Pleadings

10. Notice of the October 22, 2018 filing in Docket No. ER19-155-000 was published in the *Federal Register*, 83 Fed. Reg. 54,103 (2018), with protests and interventions due on or before November 13, 2018.[23]

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[19] *Id.* at 7 (citing *Ameren Servs. Co.*, 86 FERC ¶ 61,212 (1999)).

[20] *Id.* at 7.

[21] The Benchmark Price represents a five-year arithmetic average of the Rest-of-RTO clearing prices for PJM Delivery Years 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, with the weighted-average price for each of those years calculated according to section 4.4 of the Agreement. *Id.* at 4; Agreement §§ 1, 2.1, 4.4.

[22] Transmittal Letter at 4; Agreement § 2.1.

[23] The deadline for filing protests and interventions was later extended to November 26, 2018.

11. Notice of the October 22, 2018 filing in Docket No. ER19-156-000 was published in the *Federal Register*, 83 Fed. Reg. 54,340 (2018), with protests and interventions due on or before November 13, 2018.

12. Fayetteville Public Works Commission and North Carolina Electric Membership Corporation (NCEMC) filed timely motions to intervene. NCEMC filed a protest. On December 6, 2018, the Parties filed an answer to NCEMC's protest.

13. Notice of the Parties' Deficiency Letter Response was issued by the Commission, with interventions and protests due on or before January 28, 2019. NCEMC filed a protest. On February 8, 2019, the Parties filed an answer to NCEMC's protest.

A. Protest

14. NCEMC argues that the Commission should accept the Agreement, subject to certain conditions. NCEMC argues that the Agreement may cause disproportionate benefits between the Parties' two BAAs and may even create a subsidy from one BAA to the other.[24] NCEMC is concerned that the Agreement does not provide any reporting requirements on the proposed transactions and the filing does not contain information about the cost impacts of the Agreement on the Parties' wholesale customers.[25] NCEMC also argues that the Agreement would preserve the Parties' separate BAAs, which leads to inefficient use of resources and uneconomic behavior for transactions across the interface between the two BAAs.[26] Therefore, NCEMC requests that the Commission require the Parties to include requirements that: (1) after a two-year "sunset" period, the Parties make another filing if they wish to continue the Agreement; (2) during the two-year "sunset" period, the Parties maintain accounting records and submit informational reports to ensure that transactions are appropriate; (3) the Agreement contain a crediting mechanism to proportionally share revenues or flow them back through the Parties' formula rates; and (4) the Parties consolidate their BAAs.[27] NCEMC also requests that the Commission suspend the filing for a nominal period, subject to refund, and set it for hearing and settlement judge procedures.[28]

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[24] NCEMC November 26, 2018 Protest at 2.

[25] *Id.* at 2-3.

[26] *Id.* at 3.

[27] *Id.*

[28] *Id.* at 10.

15. In support of its proposals to include a "sunset" provision and certain reporting requirements in the Agreement, NCEMC asserts that the Parties provide no information on the magnitude of anticipated sales under the Agreement, the anticipated number of sales under the Agreement, the revenues likely to be recovered from these transactions, whether the number of sales and purchases by each Party will be proportionate or one-sided, or the effects of these capacity sales on wholesale customers. Based on Commission precedent, NCEMC argues that including reporting requirements in the Agreement would provide the Commission and the Parties' customers an opportunity to verify that the transactions are appropriate, which is especially important in light of the capacity sales being made under a blanket affiliate transaction waiver.[29] Additionally, NCEMC contends that its proposed "sunset" provision would provide the Commission and the Parties' customers the opportunity to evaluate the economic impacts of the Agreement on the Parties' wholesale customers after two years.[30] NCEMC also argues that the Parties' submission of EQRs is an insufficient protection for wholesale customers because EQRs only record sales, not purchases.[31]

16. As for its third proposed requirement, regarding a crediting mechanism, NCEMC states that it is unclear how the revenues recovered by the transactions under the Agreement will be treated. To that end, NCEMC asks that the Commission require the Parties to adopt a mechanism to treat a proportional amount of the revenues as an offset to production costs or as a credit for subsequent invoices to ensure that those revenues are appropriately flowed back through the Parties' production formula rates to the Parties' wholesale customers.[32]

17. With regard to its proposal to require the Parties to consolidate their BAAs, NCEMC argues that maintaining separate BAAs, after the Duke-Progress Merger, creates inefficiencies in Duke's operations and limits many of the benefits that should have been gained by the merger. While NCEMC acknowledges that the Joint Dispatch Agreement and the Agreement here might alleviate some of these inefficiencies, NCEMC asserts that these savings would have naturally occurred had Duke simply collapsed the BAAs. NCEMC and its affiant detail the alleged operational benefits of consolidating the

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[29] *Id.* at 4-5 (citing *Ameren Servs. Co.*, 86 FERC at 61,755; *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, at P 18 (2004)); *see also id.* at 6 (outlining what information NCEMC believes should be included in the reports).

[30] *Id.* at 5-6.

[31] *Id.* at 7.

[32] *Id.*

BAAs.[33] NCEMC also claims that maintaining two separate BAAs produces adverse impacts on wholesale customers that have generation and load in each of the BAAs. Specifically, NCEMC contends that the Joint Dispatch Agreement and the Agreement here make it easier for the Duke affiliates to transact with one another on economical basis, but leave intact barriers to trade by third parties, including separate: control areas, Open Access Same-Time Information System websites, transmission scheduling operations, interconnection request and study procedures, and ancillary services, among other things.[34]

B. Answer

18. The Parties argue that NCEMC's requested additional requirements are not necessary to ensure that the Agreement is just and reasonable, and not unduly discriminatory or preferential.[35] On the issue of NCEMC's proposed reporting requirements, the Parties reiterate that they will report sales under the Agreement in their EQRs, which, the Parties argue, provide even more robust information than the Commission has required in similar proceedings.[36] In addition, the Parties explain that, because the Agreement is between only the two Parties, if one Party reports a sale under the Agreement in its EQR, one can decipher that the buyer is the other Party and understand the terms of the transaction.[37] Further, the Parties argue that additional transparency is provided to the Parties' wholesale customers with formula rate power purchase agreements because those agreements have extensive audit provisions that enable those customers to review inputs into the formula rates. The Parties contend that customers may exercise those rights to review sales made under the Agreement and documentation that must be retained for five years under section 4.1 of the Agreement.[38]

19. In response to NCEMC's request for a "sunset" provision, the Parties respond that such a provision is unnecessary since wholesale customers with formula rate power purchase agreements will have the opportunity to audit and review the impact of the Agreement during each rate year in question. Further, the Parties state that, by the

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[33] *Id.* at 7-9; McCullough Aff. ¶¶ 13, 16, 23-25.

[34] NCEMC November 26, 2018 Protest at 9.

[35] Parties December 6, 2018 Answer at 1, 3.

[36] *Id.* at 3.

[37] *Id.* at 4.

[38] *Id.* at 4.

Agreement's terms, the Agreement will only be renewed past May 31, 2022, if the PJM capacity price is equal to or less than the Benchmark Price, which limits any economic impacts from increasing capacity prices.[39] As for NCEMC's criticism that the Parties did not provide cost data in support of the filing, the Parties argue there is no reasonable basis for providing quantitative analyses of projected sales under the Agreement. The Parties state that they have explained the benefits and savings potential for wholesale customers instead. As for NCEMC's arguments that the Agreement may provide lopsided benefits to either Party, the Parties respond that both Parties will benefit. The Parties explain that, if either Party makes a sale pursuant to the Agreement, it will do so because that capacity is not being utilized, allowing the providing Party to capture the incremental value from the capacity sale and to generate additional revenue that may be credited back to wholesale customers through their formula rate power purchase agreements; likewise, the recipient Party will only make a purchase where the price is lower than otherwise available in the market, again providing benefit to customers.[40]

20. With regard to NCEMC's request that the Commission condition acceptance of the Agreement on the Parties consolidating their BAAs, the Parties argue that the Agreement satisfies the standards for acceptance under FPA section 205 without this condition. The Parties assert that, under FPA section 205, the Commission need not determine that the Agreement is superior to other possible solutions (such as consolidating the BAAs), and the existence of other potentially superior solutions does not make the Agreement unjust and unreasonable.[41] The Parties add that NCEMC's request for BAA consolidation is beyond the scope of this proceeding and is an impermissible collateral attack on prior Commission orders.[42] The Parties contend that Duke's decision to maintain separate BAAs was made in conjunction with the Duke-Progress Merger and that the Commission's approval of that merger was conditioned on Duke maintaining separate BAAs.[43] Further, the Parties add that NCEMC's allegations

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[39] *Id.* at 4-5 (citing Agreement § 2.1).

[40] *Id.* at 5-6.

[41] *Id.* at 6-7 (citing *Cities of Bethany v. FERC*, 727 F.2d 1131 (D.C. Cir. 1981); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995); *Sw. Power Pool, Inc.*, 158 FERC ¶ 61,063, at P 13 (2017); *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,109, at P 20 (2009); *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017)).

[42] *Id.* at 7 (citing *NSTAR Elec. Co. v. ISO New Eng. Inc.*, 120 FERC ¶ 61,261, at P 33 (2007); *Cent. Vt. Pub. Serv. Corp.*, 123 FERC ¶ 61,128, at P 35 (2008)).

[43] *Id.* at 7 (citing *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 81 (2011)).

of "adverse impacts" to wholesale customers as a result of separate BAA requirements exist for any entity transacting in different BAAs, including the Parties' own activity across the three separate BAAs, and provide no basis for finding the Agreement unjust, unreasonable, unduly discriminatory or preferential.[44]

C. Deficiency Letter Response

21. In their Deficiency Letter Response, the Parties clarify that "RTO Locational Delivery Area" in the formula for determining capacity pricing under the Agreement refers to the Rest-of-RTO Resource Clearing Price for the applicable PJM capacity market auction.[45]

22. With respect to the information that the Parties will report in their EQRs regarding the capacity sales made pursuant to the Agreement, the Parties state that the EQR transaction data for each transaction will link the transaction to the Agreement. The Parties explain that the EQR transaction data will also identify the start and end time of the transaction (providing the duration), the amount of capacity, and the price.[46]

23. As for the ability of the Parties' wholesale customers to challenge transactions pursuant to the Agreement, the Parties state that the Agreement does not contain any challenge or audit provisions because it only encompasses the terms for the bilateral sales between the Parties. That said, the Parties explain that the payments made by the recipient Party and the revenues received by the providing Party under the Agreement will flow through to the Parties' wholesale customers via the Parties' respective wholesale formula rate power purchase agreements. According to the Parties, these agreements include extensive audit provisions that enable wholesale customers to review elements that flow through the formulas, including the revenue credits and purchased capacity costs associated with transactions under the Agreement. The Parties provide examples of the language contained in these agreements and how it could be used to challenge transactions pursuant to the Agreement. The Parties further note that wholesale customers retain their FPA section 206 rights to challenge the Agreement and its effect on rates charged under their formula rate contracts.[47]

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[44] *Id.* at 8.

[45] Deficiency Letter Response at 1-2; Agreement § 4.4.

[46] *Id.* at 2-4; *see also id.*, Attach. A (providing an example of the transaction data that the Parties would report for four example transactions under the Agreement).

[47] *Id.* at 4-7.

24. The Parties also explain in greater detail how they will obtain additional savings for native load customers through the Agreement. In particular, the Parties state that the Agreement will yield additional savings by allowing the Parties to: provide access to a potentially less costly capacity supply alternative during tight capacity conditions; avoid unnecessary purchases of higher-priced bundled capacity and energy; and avoid the commitment of more costly or less flexibly dispatched and operated generation. The Parties explain that, to obtain short-term capacity, the Parties typically engage in bilateral transactions with other market participants in the Southeast region. According to the Parties, since the Southeast region is not a liquid market, short-term capacity prices fluctuate in response to tight supplies or transmission constraints; the capacity prices under the Agreement, however, do not vary based on these conditions, thereby adding competitive supply to the market. The Parties provide an example to illustrate.[48] The Parties add that the potential avoided cost savings are accentuated by the fact that most short-term capacity offers in the Southeast region are bundled with energy and, as a result, include higher energy costs during high-demand periods. The Parties state that they arrange for energy transactions under the Joint Dispatch Agreement, such that, without the Agreement, they may have to purchase short-term capacity bundled with high-priced energy that the Parties do not need. Further, the Parties state that, absent the Agreement, their alternative to procuring short-term capacity in the Southeast region would be to commit a generation resource that otherwise would have been offline, causing the Parties to incur start-up and incremental fuel costs.[49]

25. Lastly, on the issue of cross-subsidization between the Parties' respective wholesale customers, the Parties reiterate that neither Party has market-based rate authority within its BAA; as such, the Parties state that the Agreement is a stand-alone rate schedule, with an appropriate proxy price, rather than a market-based sales agreement. The Parties assert that the Agreement prevents cross-subsidization from selling below costs because the Agreement enables only capacity sales and the Parties' capacity costs are "sunk costs" (the Parties have already incurred the costs to build the generation facilities). The Parties argue that, absent the Agreement, those generating facilities would not be dispatched to provide temporary, excess capacity, but customers would still have to pay for their costs via the Parties' generation revenue requirements. The Parties contend that the Agreement prevents cross-subsidization from selling above costs because the Agreement uses the Rest-of-RTO PJM proxy price as the proxy price. The Parties further note that the Agreement requires the Parties to make reasonable market inquiries to guarantee that no more economical capacity supply alternatives exist

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[48] *Id.* at 7-9; *see also id.*, Attach. B (using two example transactions to show the revenue requirement impact on production rates for the Parties' wholesale customers).

[49] *Id.* at 9-10.

before transacting pursuant to the Agreement, which prevents the Parties' captive customers from paying above-market rates.[50] The Parties also outline how revenue credits and purchased capacity costs will be reflected in production rates for the Parties' wholesale customers.[51]

D. Protest to Deficiency Letter Response

26. NCEMC asserts that the Deficiency Letter Response fails to demonstrate that the proxy price is reasonable or that customers will benefit from, and not be harmed by, the proposed transactions under the agreement. NCEMC argues that the Parties have provided no evidence to demonstrate that the cost of supplies otherwise available in the market over the past few years would have resulted in prices that are higher than the cost of the Parties' own capacity, or higher than PJM's capacity market clearing price (the Agreement's proxy price). Moreover, NCEMC points to the lack of evidence that the benefits of capacity sales made pursuant to the Agreement will not have a lopsided impact across the separate BAAs.[52] NCEMC also expresses concern with the absence of any means to verify the Parties' commitment to not engage in transactions under the Agreement if there are lower-priced capacity supply alternatives available.[53]

27. NCEMC further contends that the Parties' assertions of cost savings are premised on a discriminatory outcome: while the Parties benefit from the integration of their respective resources across their separate BAAs, customers continue to remain captive to the separate transmission systems of the two Parties. NCEMC adds that, by using the Agreement and the Joint Dispatch Agreement to provide capacity and energy flows across the Parties' internal borders in a manner that effectively integrates the two BAAs, the Parties provide themselves a competitive advantage over third parties that are captive to the Parties' separate transmission systems. NCEMC argues that, because of the lopsided benefits for the Parties, including the possibility of those benefits accruing for one of the Party's customers at the expense of the other Party's customers, it is imperative that the Commission condition acceptance of the Agreement on additional reporting requirements.[54]

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[50] *Id.* at 10-11.

[51] *Id.* at 11-12, Attach. B.

[52] NCEMC January 28, 2019 Protest at 2-3.

[53] *Id.* at 4.

[54] *Id.* at 4-6.

28. NCEMC disagrees that the Parties' EQRs will provide sufficient transparency because EQR transaction data does not capture all of the data NCEMC believes is needed, including the actual cost of capacity being sold or alternative economic capacity transactions that may have been available (i.e., customers cannot see the opportunity costs). Further, NCEMC argues, given the quantity of transactions the Parties are required to file in their respective EQRs, it is unrealistic to expect customers to review quarterly entries looking for specific transactions related to the Agreement. NCEMC asks that, rather, the Parties be required to cull the relevant data from the EQRs and publish a report summarizing the data.[55] As for the audit and challenge procedures in the Parties' wholesale formula rate power purchase agreements, NCEMC asserts that these provisions fail to ensure sufficient transparency. NCEMC points to its recent agreements with each of the Parties, which limit the record retention period to two years and the challenge period to either one or two years.[56] NCEMC also contends that the Agreement fails to provide a remedy for any harm or lopsided benefits that might occur even if customers were able to demonstrate such harm with the limited information available to them. NCEMC argues that the only option available to customers to adequately challenge or audit transactions under the Agreement would be to file a complaint with the Commission, putting the burden on the customers despite their lack of access to needed information.[57]

29. Additionally, NCEMC counters the Parties' argument that NCEMC's request to consolidate the BAAs constitutes a collateral attack on prior Commission orders. NCEMC argues that this filing represents a significant change in the circumstances on which the Duke-Progress Merger was based.[58] In particular, NCEMC points to Duke's statement in the Joint Dispatch Agreement application that it was not proposing "system integration or combination of other utility operations," nor would the Joint Dispatch Agreement provide for joint operation of capacity, transmission systems, or BAAs.[59] NCEMC adds that, while the Agreement states in section 3.2 that nothing in the Agreement requires a single integrated system, the Agreement, if accepted, would effectively permit the Parties to treat their capacity, in addition to their energy (via the

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[55] *Id.* at 6-7.

[56] *Id.* at 7-8.

[57] *Id.* at 8-10.

[58] *Id.* at 10-11 (citing *Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,083, at P 68 (2003)).

[59] *Id.* at 11 (quoting Duke Energy Corp., Transmittal Letter, Docket No. ER12-1338-000, at 4 (Mar. 26, 2012)).

Joint Dispatch Agreement), as though they operated a single integrated system. NCEMC argues that the Agreement is only necessary due to the Parties' maintenance of separate BAAs, which limits the economic benefits of the Duke-Progress Merger.[60] NCEMC asserts that, although the Agreement allows the Parties to economically use their capacity in both of their respective BAAs, NCEMC will not have the same opportunity; rather, NCEMC will continue to be treated as two separate transmission customers, one for each Party's system. Therefore, NCEMC continues, the combined effect of the Joint Dispatch Agreement and the Agreement makes it easier for the Parties to transact with one another, while leaving intact barriers to trade by third parties that the seam between them entails, rendering the Agreement unduly preferential and unjust and unreasonable.[61]

E. <u>Answer to NCEMC's Protest to Deficiency Letter Response</u>

30. With regard to NCEMC's argument that the Agreement is a "significant change in circumstances" since the Commission accepted the Duke-Progress Merger and Joint Dispatch Agreement, the Parties state that the Joint Dispatch Agreement specifically contemplated the possibility of a separately filed agreement to facilitate capacity sales, like the Agreement here.[62]

31. In response to NCEMC's claim that the Agreement provides the Parties a competitive advantage by effectively integrating the Parties' generation facilities, the Parties reiterate that the Agreement does not alter the Parties' obligations to comply with the separate transmission scheduling requirements or other Joint OATT obligations associated with continuation of separate BAAs. Further, the Parties charge that NCEMC's argument is a collateral attack on the Progress-NCEMC formula rate power purchase agreement that was accepted by the Commission.[63] Additionally, the Parties argue that NCEMC's reliance on that agreement is misplaced since sales made pursuant to the Agreement here represent short-term capacity, an entirely different product than that provided by Progress to NCEMC. Because the Agreement's capacity sales are not comparable, the Parties argue there is no conceivable competitive advantage to be gained.

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[60] *Id.* at 11.

[61] *Id.* at 11-12.

[62] Parties February 8, 2019 Answer at 1 n.2 (referencing section 8.1 of the Joint Dispatch Agreement).

[63] *Id.* at 3 (citing *New Eng. Conference of Pub. Utils. Comm'rs, Inc. v. Bangor Hydro-Elec. Co.*, 135 FERC ¶ 61,140, at P 27 (2011)).

The Parties emphasize that sales will only occur under the Agreement if one Party has available excess capacity, meaning capacity that is not reserved for serving native load.[64]

32. The Parties also respond to NCEMC's argument that the Agreement does not include sufficient challenge and audit procedures, countering that NCEMC's arguments are a collateral attack on the terms of NCEMC's Commission-accepted wholesale formula rate power purchase agreement.[65] The Parties note that they are both partners and competitors with NCEMC in the competitive marketplace for capacity and energy, and NCEMC should not be allowed to leverage its protest here to create a price discovery mechanism broader than its contractual audit rights. In fact, the Parties contend that NCEMC's requested reporting requirements could put the Parties at a competitive disadvantage when negotiating with third parties.[66]

III. Discussion

A. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[67] the timely, unopposed motions to intervene serve to make the entities that filed them parties in this proceeding.

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.[68] We will accept the Parties' answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

35. For the reasons discussed below, we accept the Agreement, effective December 22, 2018, as requested. We find the Agreement to be a just and reasonable, and not unduly discriminatory or preferential, mechanism for the Parties to sell each other

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[64] *Id.* at 3-4.

[65] *Id.* at 4-5.

[66] *Id.* at 5 n.14.

[67] 18 C.F.R. § 385.214 (2018).

[68] *Id.* § 385.213(a)(2).

short-term capacity when one Party has more capacity than it needs and the other Party has determined that it would benefit from the acquisition of such capacity.

36. The Parties have demonstrated the potential savings to be gained on behalf of their respective wholesale customers by the addition of a new short-term capacity supply alternative in an otherwise limited market.[69] The Agreement requires that the providing Party determines that it will have temporarily excess capacity (i.e., more capacity than is required to meet applicable reliability standards).[70] As the Parties explain, this new short-term capacity supply alternative is particularly valuable in the Southeast region where short-term capacity offers are typically bundled with energy that the Parties are unlikely to need given the operation of their Joint Dispatch Agreement.[71] The potential savings are assured by the requirement in the Agreement that the Parties will engage in a transaction only if the recipient Party has determined, to the best of its knowledge "after making reasonable market inquiries under the circumstances, there are not at that time more economical alternatives available" to the recipient Party to obtain capacity for that period.[72] In addition, the price for capacity sold under the Agreement, calculated using the PJM Rest-of-RTO locational deliverability area capacity market clearing prices as a proxy, further assures us that the Agreement will serve to benefit both the Parties and their wholesale customers by using a transparent and objective pricing methodology.[73] Finally, we note that because the Parties lack the authority to make sales at market-based rates in either of the Parties' BAAs, the Agreement is a standalone rate schedule, independent of the Parties' respective market-based rate tariffs, and the prices prescribed in the Agreement ensure that capacity will not be sold under the Agreement at a higher rate than allowed by the Parties' respective cost-based tariffs.[74]

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[69] Deficiency Letter Response at 7-9.

[70] Agreement § 4.1.

[71] Transmittal Letter at 2; Deficiency Letter Response at 9-10.

[72] Agreement § 4.1.

[73] Agreement § 4.4(b)-(c); Transmittal Letter at 6-7.

[74] The stated capacity prices for transactions occurring during the initial term of the Agreement are lower than the maximum cost-based rate the Parties are allowed to charge under their respective cost-based tariffs. Beyond the initial term, the Benchmark Price effectively establishes a price cap that is, again, lower than what the Parties are allowed to charge under their respective cost-based tariffs. Pursuant to their respective cost-based rate tariffs, Duke Energy Carolinas' daily capacity charge is $394.00/MW-day and Progress' daily capacity charge is $219.86/MW-day. *See* Duke Energy Carolinas,

37. We disagree that NCEMC's proposed additional requirements are necessary to render the Agreement just and reasonable and not unduly discriminatory or preferential. With regard to the proposed "sunset" period, we emphasize that the Parties are only permitted to engage in a transaction under the Agreement after the recipient Party has made reasonable market inquiries under the circumstances to determine that there are not more economical alternatives available.[75] Therefore, the Parties may transact under the Agreement only if, to the best of recipient Party's knowledge, the transaction is the most economical option to procure the needed short-term capacity. NCEMC has provided no reason to limit the effectiveness of the Agreement by having it "sunset" after two years. Furthermore, by its terms, the Agreement will automatically terminate after May 31, 2022, or any subsequent one-year extensions, if the price of capacity under the Agreement is greater than the fixed Benchmark Price, thereby limiting the potential impact of increasing capacity prices on the Parties' wholesale customers.[76]

38. We similarly find NCEMC's proposed reporting requirements are unnecessary. The requirement that the Parties record and report transactions under the Agreement in their EQRs provides sufficient transparency. While NCEMC argues that the EQR transaction data is inadequate because EQRs only record sales, the Parties outline how their wholesale customers can use the EQR transaction data linked to the Agreement to discern which is the providing Party and which is the recipient Party, and ascertain the duration of the transaction, the amount of capacity, and the price, among other details.[77] In addition, we note that the Agreement requires the recipient Party to retain for five years documentation associated with transactions, including that Party's reasonable market inquiries made before engaging in a transaction covered by the Agreement.[78] We also find that the Parties' wholesale formula rate power purchase agreements with their customers provide meaningful challenge and audit procedures for disputing any charges

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Tariffs, Rate Schedules and Service Agreements, Tariff Volume No. 6 (Cost-Based Rate Tariff), § IV.1.i (0.0.0); Progress, Tariffs, Rate Schedules, and Service Agreements, Tariff Volume No. 6 (Cost-Based Rates Tariff), Attach. C (2.0.0).

[75] Agreement § 4.1.

[76] Agreement § 2.1.

[77] NCEMC November 26, 2018 Protest at 7; NCEMC January 28, 2019 Protest at 6-7; Parties December 6, 2018 Answer at 4; Deficiency Letter Response at 2-4, Attachs. A, B.

[78] Agreement § 4.1.

or credits resulting from a transaction under the Agreement, including the ability to examine the Parties' records even before challenging the wholesale rate.[79]

39. As to NCEMC's concerns about cross-subsidization between the two BAAs, we find that there are adequate protections. The Agreement, by using the Rest-of-RTO PJM proxy price, provides an independent and transparent benchmark to ensure that transactions do not result in "lopsided benefits" for one of the Parties.[80] We also note that under the Agreement, the Parties are permitted to engage in a transaction only after the recipient Party has made reasonable market inquiries under the circumstances to determine that there are not more economical alternatives available.[81] Additionally, given that short-term capacity offers are typically bundled with energy in the Southeast region, the providing Party is unlikely to find a buyer for its temporarily excess unbundled short-term capacity. We note, again, that the prices prescribed in the Agreement ensure that capacity will not be sold under the Agreement at a higher rate than allowed by the Parties' respective cost-based tariffs. Rather, transactions under the Agreement are made pursuant to the independent, market-based Rest-of-RTO PJM proxy price, which prevents cross-subsidization by ensuring that the Parties will not inflate or deflate prices to the benefit or detriment of their wholesale customers.

40. NCEMC also expresses concerns about how the revenues recovered by the transactions under the Agreement will be treated, asking that the Commission require the Parties to adopt a mechanism to treat a proportional amount of the revenues as an offset to production costs or as a credit for subsequent invoices.[82] However, we find that no such mechanism is needed because the Parties explain in their Deficiency Letter Response how the Agreement will reflect revenue credits and purchased capacity costs in production rates for the Parties' wholesale customers with formula rates.[83]

41. Finally, we find NCEMC's request to require the Parties to consolidate their BAAs is beyond the scope of this proceeding, which is limited to whether the Agreement is a just and reasonable, and not unduly discriminatory or preferential, means for the

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[79] *E.g.*, Deficiency Letter Response at 5-6 (excerpting from two wholesale formula rate power purchase agreements on file with the Commission).

[80] Agreement § 4.4.

[81] Agreement § 4.1.

[82] NCEMC November 26, 2018 Protest at 7.

[83] Deficiency Letter Response at 11-12, Attach. B; *see also* Parties December 6, 2018 Answer at 5-6.

Parties to exchange short-term capacity, and does not extend to whether consolidation of the Parties' BAAs would be more efficient. As for NCEMC's claims that the Agreement is unjust, unreasonable, unduly discriminatory and preferential because it gives the Parties a competitive advantage, the Agreement requires the Parties to obtain firm transmission service pursuant to the Joint OATT (the same as any other transmission customer), and requires the Parties to abide by their commitments made in the Duke-Progress Merger proceeding.[84] Additionally, although NCEMC claims that the Parties are effectively integrating their BAAs, nothing in the Agreement changes the Parties' responsibility to operate their separate BAAs[85] and the Agreement explicitly states that it does not require a single integrated system, BAA, control area, or transmission system, nor joint planning or joint development of generation or transmission.[86]

The Commission orders:

The Agreement is hereby accepted, effective December 22, 2018, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[84] Agreement § 4.3.

[85] Parties February 8, 2019 Answer at 3.

[86] Agreement § 3.2.